

NTSB Order No. EA-5142

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of February, 2005

Respondent.

Docket SE-16843

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on July 17, 2003, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's pilot certificate for 180 days, on finding that respondent had violated 14 C.F.R. 61.3, 61.31(a), 61.58(a)(1) and (2), and 91.13(a) of the Federal Aviation Regulations (FARs) by operating

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an aircraft as pilot-in-command (PIC) when he was not qualified to do so.² We deny the appeal.

The basic facts are straightforward and not in dispute. Respondent owns a number of aircraft, including the Sabreliner jet aircraft involved here. This aircraft requires two crewmembers, a PIC and a co-pilot/first officer. The PIC must be rated and checked in the aircraft; the co-pilot need not be. Respondent at the time was not PIC-rated nor checked in the aircraft, as the cited regulations require.

On the day in question, respondent's usual PIC, an employee of his company, was unavailable. Respondent contacted Herbert Hortman of Hortman Aviation to obtain a second crewmember. Mr. Hortman had provided other piloting services to respondent in the past. Hortman Aviation would make one-third again more money for providing a pilot, as opposed to a co-pilot. Hortman Aviation sent Dennis Stec. Mr. Stec was not qualified to be PIC. Various

² Section 61.3(a) prohibits acting as a PIC or crewmember without a valid pilot certificate. Section 61.13(a) requires that a PIC of certain aircraft (including the aircraft involved here) hold a type rating for that aircraft. Sections 61.58(a)(1) and (2) require, first, that the PIC of an aircraft that requires more than one pilot crewmember (as the aircraft here) complete a PIC proficiency check in an aircraft that requires more than one pilot crewmember within 12 calendar months, and, second, requires a PIC proficiency check within every 24 months in the particular type of aircraft in which the individual will serve as PIC. Section 91.13(a) prohibits careless or reckless operations that endanger the life or property of another. The section 91.13(a) charge here is residual, and no one has argued otherwise. Therefore, it will not be further discussed. See Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at n.17, and cases cited there (a violation of an operational FAR regulation is sufficient to support a finding of a "residual" or "derivative" section 91.9 [now section 91.13(a)] violation).

flight legs were flown, with passengers. Respondent flew the aircraft for the vast majority, if not the entirety, of the flights (respondent testified to flying 90% of the time; Mr. Stec testified that respondent flew all legs and all takeoffs and landings). Respondent and Mr. Stec did not discuss who was going to be PIC.

Beyond these facts, the parties disagree. Mr. Hortman testified that respondent told him that respondent would be the PIC and that he needed a co-pilot. Thus, Mr. Hortman testified, he provided a co-pilot who did not (and was not required to) have the necessary rating or proficiency checks to be PIC.³ He said he took respondent at his word when respondent told him that he was qualified in the aircraft.

Dennis Stec testified that he believed respondent was the PIC, that respondent sat in the left seat, and that respondent gave all the orders. The manner in which the flight was conducted and the roles of each in the cockpit left no doubt in Mr. Stec's mind that respondent was the PIC; Mr. Stec had no idea that respondent was not qualified to fly this aircraft as PIC.

In contrast, respondent testified that he asked for a pilot, that Mr. Stec filed the flight plan (respondent could not explain why the flight plan filed with the FAA listed respondent as

³ On appeal, respondent contends that Mr. Hortman's pronoun use in his testimony and an earlier written statement leaves ambiguous who was going to be the captain (PIC). See Appeal Brief at 13. We disagree. There is other testimony (see, e.g., Tr. at 76-77) that clearly indicates Mr. Hortman's belief that respondent asked for a co-pilot, not a PIC.

captain), and that Mr. Stec's performance gave respondent the feeling that Mr. Stec was a "qualified" and "professional" pilot. Tr. at 136-137. Respondent questioned Mr. Hortman's integrity and suggested that his testimony should not be credited. Other witnesses testified to respondent's good character. An expert witness testifying for respondent stated that a company such as Hortman Aviation would/should have detailed pilot training and certificate records, and that in this case, had it been his company, he would have required proof that the PIC was properly qualified.

In his appeal, respondent claims that he was prejudiced by the failure of Messrs. Hortman and Stec to respond to his subpoena for documents and that, due to their failure to produce anything, they should not be permitted to testify.⁴ Respondent also argues that it was error for the law judge to rely on Mr. Hortman's testimony because, in addition to it being ambiguous (see footnote 3), Mr. Hortman was untrustworthy, unreliable and incredible, as shown by his failure to respond to the subpoena by producing the evidence sought.

We find no error in the law judge allowing the testimony, and respondent did not argue that there was any surprise in it. In fact, the Administrator's response to interrogatories indicated the scope of Mr. Hortman's contemplated testimony, and

⁴ Respondent does not seem to pursue this argument vis-à-vis Mr. Stec. Mr. Stec testified that he never received the subpoena, perhaps because he was no longer working at Hortman Aviation when it was sent there.

it was no broader.

Respondent's claim that Mr. Hortman's statement that he had no responsive documents was clearly a lie and should have caused the law judge to disbelieve all his other testimony is also meritless, in our view. We agree that it is more likely than not that the witness should have had some sort of records concerning the flights, if only billing information. But it is the law judge's special function to weigh the credibility of witnesses' testimony on various subjects. Further, on cross-examination respondent did not ask the witness detailed questions about the types of records the witness might have had; respondent had the opportunity to explore Mr. Hortman's understanding or misunderstanding of the subpoena but chose not to do so. Respondent may not now have just one interpretation. Given the actual testimony and the brevity of the discussion on both sides, it is possible that Mr. Hortman did not appreciate that he was being asked for any record at all about the flight. His response may have been the result of confusion (he does not appear to have been represented in this matter).

Respondent did not articulate what such records might have demonstrated that would have helped his case. For example, had Hortman Aviation billed respondent for a PIC, respondent too should have had a copy of the bill to present, and we assume he would have done so. Had there been documentary evidence undermining the Administrator's case, it clearly would have had an effect on the investigation, and should have been part of the

investigator's report, which respondent received. See Administrator's answers to interrogatories.

The critical issue in this case is one of credibility, and we defer to the law judge's determination. It is, we acknowledge, possible that there was a miscommunication here, respondent believing he had asked for and received a PIC, and Mr. Hortman believing respondent had asked for (and received) a co-pilot. However, the key issue before the law judge at the hearing was very simple and different from the issues as posed by respondent: who was the PIC on the flights? The alleged regulatory violations were of two types: failure to hold certain ratings and checks, and operating as PIC without those required qualifications. As to the first, respondent admitted his lack of qualification and it is clear that respondent understood that he could not lawfully be the PIC (at the time he was working towards that qualification).

As to the second type, we agree with the law judge that respondent's defense is not adequate or convincing. Even if there was a misunderstanding between respondent and Mr. Hortman regarding whether a qualified PIC was being requested, the question of who actually acted as the PIC is a question of fact judged by all the circumstances surrounding the flights themselves.

Acting as PIC is not an inadvertent act. The law judge found that respondent deliberately chose to operate the aircraft as PIC. Tr. at 200. Mr. Stec's testimony is most compelling.

An air transport-rated professional pilot at the time with 8900 hours, Mr. Stec had no doubt that respondent was acting as the PIC, and respondent on appeal makes no argument to undermine the import or veracity of Mr. Stec's testimony.⁵

We also cannot agree with respondent's argument that he could reasonably rely on Hortman Aviation to ensure that respondent, in his own aircraft, had a properly qualified PIC and that respondent had no independent obligation to do so. We see no legal basis to argue that respondent had some right or reason to rely on Hortman Aviation in this way. Hortman Aviation was providing the service of a pilot; it had no interest in the aircraft, or the flights.

Respondent, on the other hand, had an obligation, as the owner of the aircraft and as the person who hired the second pilot (in whatever capacity), to ensure before these flights took place that the aircraft would be operated lawfully. Even if there had been some sort of miscommunication with Mr. Hortman, a simple query to Mr. Stec or more thorough preflight planning

⁵ See infra at 3, and Tr. at 169-173, where the witness discusses various details of the flight, what functions he performed, and what functions respondent performed. For example, Mr. Stec got the ice and coffee, he worked the radios, he set up the approaches for respondent and did the navigating; he did not do any briefing. These activities are consistent with co-piloting tasks. Counsel for respondent did not cross-examine Mr. Stec on any of these matters. And, as noted, documentary evidence included flight strips used by the FAA, which indicated that respondent was the captain. Respondent's questioning of witnesses did not elucidate how this might have come about without respondent's knowledge.

would have avoided this incident and the flights in violation of the FARs.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 180-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.⁶

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

⁶ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).